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IN THE

Supreme Court of The United States

1964

No. [redacted] 76

THE CORTEZ COMPANY,

Petitioner

—vs—

MANATEE COUNTY, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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IN THE

Supreme Court of The United States

No. 1100

THE CORTEZ COMPANY,

Petitioner,

—vs—

MANATEE COUNTY, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, Trustees of the Internal Improvement Fund of the State of Florida, admit that the jurisdiction of the United States Supreme Court is properly invoked by the Petition for Writ of Certiorari under the provisions of Title 28 U.S.C.A., Section 1257 (3). It is solely within the discretion of the Court to determine whether the importance of the case warrants further consideration. Respondents herewith respectfully submit the following memorandum in an effort to assist the Court in making its determination.

REPORTS OF THE OPINIONS DELIVERED BY THE LOWER COURTS

1. Opinion of the Supreme Court of Florida affirming order of Circuit Court dismissing the Petitioner's complaint, was announced January 17, 1964. Mandate issued February 13, 1964, a copy of said opinion appears in the appendix hereto.

2. Order of the Supreme Court of Florida denying Petition for Rehearing was filed February 13, 1964. A copy of said order appears in the appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

1. IS SECTION 253.122 OF THE 1957 FLORIDA STATUTES VOID AND UNCONSTITUTIONAL IN THAT IT IMPAIRS THE OBLIGATIONS OF A CONTRACT CONTRARY TO ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES?

2. IS THE DECISION FIXING SUCH A BULKHEAD LINE VOID AND UNCONSTITUTIONAL IN THAT IT IMPAIRS THE OBLIGATION OF A CONTRACT CONTRARY TO ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES?

3. IS THE DECISION FIXING SUCH A BULKHEAD LINE VOID AND UNCONSTITUTIONAL IN THAT IT IS A TAKING OF THE PRIVATE PROPERTY OUTSIDE THE BULKHEAD LINE, WITHOUT JUST COMPENSATION, CONTRARY TO AMENDMENT XIV OF THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL PROVISIONS AND FLORIDA STATUTES INVOLVED

1. United States Constitution, Article I, Section 10.
2. United States Constitution Fourteenth Amendment.
3. Section 120.041(1), Florida Statutes, 1964.
4. Section 253.12, Florida Statutes, 1957.
5. Section 253.122, Florida Statutes, 1957.
6. Section 253.15, Florida Statutes, 1957.

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

It is respectfully submitted that Question One, above is not germane. Section 253.122 of the 1957 Florida Statutes, considered apart from any application thereof, is innocuous. Perhaps the statute could be applied in an unconstitutional manner, but standing alone the statute is constitutional on its face. For this reason, and the fact that a consideration of Section 253.122, Florida Statutes, is inherent in a consideration of Question Two, Respondents, Trustees of the Internal Improvement Fund, suggest that Question One be disregarded.

Question Two, above, is relevant. In the light of the above observations with respect to Question One, Respondents would suggest that Question Two be reworded to read as follows:

2. Is the decision made pursuant to Section 253.122, Florida Statutes, fixing such a bulkhead line void and

unconstitutional in that it impairs the obligation of a contract contrary to Article I, Section 10 of the Constitution of the United States?

Respondents have no argument with the form of Question Three above.

RESPONSE ON THE MERITS

The application of Section 253.122, Florida Statutes, to Petitioner's lands does not constitute an impairment of contract. A law which does not strike at the vitality of a contract either by altering its terms or preventing its preservation and enforcement does not impair its obligation. A statute which does not act on the contract itself but merely on the property which is the subject of the contract may not be said to impair the obligation of the contract. 16 A. C.J.S., *Constitutional Law*, Section 353, pp. 23 and 24. In *Curtis v. Whitney*, 13 Wall. 69, 80 U.S. 68 at 70 and 71 (1871); it was held:

". . . Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making of a large class of contracts, that they may be affected in many ways by State and National legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution so long as the obligation of performance remains in force."

In the case at bar, Petitioner had entered into a purchase contract with Respondents, Trustees of the Internal

Improvement Fund, to purchase certain submerged lands in Manatee County, Florida. Under the provisions of Section 253.15, Florida Statutes of 1955, Petitioner had the right to bulkhead and fill said submerged lands. In 1957 the Florida Legislature passed Section 253.122, Florida Statutes, authorizing the Boards of County Commissioners to set bulkhead lines subject to the formal approval of the Trustees of the Internal Improvement Fund. In 1959, the Board of County Commissioners established the disputed bulkhead line.

Petitioner's contract with the Trustees of the Internal Improvement Fund after the setting of the bulkhead line was nevertheless in full force and effect. There was no lessening of the means provided by law for the enforcement of the contract. Consequently, there was no impairment of contract.

Assuming, solely for purposes of argument, that there had been an impairment of the obligation of contract, the decision of the Florida Supreme Court was nevertheless correct. Legislation which is enacted in a proper exercise of the police power is not an unconstitutional impairment of the obligation of contract. 16 A. C.J.S., *Constitutional Law*, Section 353, p. 24.

In *Manigault v. Springs*, 199 U.S. 473, Plaintiff and Defendant entered into contract whereby it was agreed that Defendant should remove obstructions to a navigable creek so as to give Plaintiff a clear passage through the

creek. The General Assembly of the State of South Carolina passed an act giving the Defendants, by name, the authority to erect and maintain a dam across said creek. Against the contention that said act was an impairment of the obligation of contract, it was held that:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into by the individuals may therefore be affected. This power, whic! in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts by the individuals."

See also *Cities Service Gas Co. v. Peerless*, 340 U. S. 179; *Smith v. Hoboken Railroad, Warehouse & Steamship Connecting Co.*, 328 U. S. 123; *East New York Savings Bank v. Hahn*, 326 U. S. 230; *Faitoute Iron & Steel Co. v. City of Asbury Park*, 216 U. S. 502; *Phillips Petroleum Co. v. Cabot*, 210 F. 2d 841, United States Court of Appeals, 10th Circuit, 1954 vacated and remanded on other grounds, 343 U. S. 390.

Section 253.122, Florida Statutes, is an exercise of the police power. See *Zabel v. Pinellas County Water and Navigation Control Authority*, (Fla.) 154 So. 2d 181 (1963). In further support of this proposition, the court's attention is directed to Rule 200-2.02 of the Rules of the

Trustees of the Internal Improvement Fund. Said rule was promulgated under the authority of Section 253.122, Florida Statutes, and filed with the Secretary of State of the State of Florida in accordance with Section 120.041 (1), Florida Statutes. Section 200-2.02, is as follows:

Bulkhead line criteria.--Criteria for evaluation of the locations for bulkhead lines shall include the possible consequential effects of sales and filling submerged lands upon

(1) Free use of public waters for navigation, transportation and public recreation.

(2) Conservation of marine life, wildlife and other natural resources.

(3) Erosion of uplands, shoaling of channels, accretion, tidal currents, flow of water, storm tides and hurricane damage.

(4) Upland property values and the economy of the zone.

(5) Natural beauty and recreational advantages of the area.

(6) Public beaches, Atlantic Ocean frontages for which bulkhead lines will not be approved, and public rights of way in which no bulkhead lines will be approved.

(7) Problems of the area including need of improvement of shore lines, elimination of stagnant pockets, availability of fill material, effects of dredging

beyond the bulkhead line to obtain fill material, preservation of fresh water drainage into the public waters, equitable divisions of submerged lands for allocation and sale to riparian owners, particularly in coves, the effect of anticipated scattered sales and filled extensions in the general area pending sales and filling to the bulkhead line by all waterfront owners."

Therefore, even if the obligation of contract had been impaired, no constitutionally prohibited impairment took place under the application of Section 253.122, Florida Statutes, to Petitioner's lands because said application was a valid exercise of the police power of the state.

Petitioner's third question for review may be answered by the words of Mr. Justice Douglass in *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80 at 83, (1946):

"Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. *Reinman v. Little Rock*, 237 U. S. 171, 59 L. ed 900, 35 S. Ct. 511; *Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. ed 348, 36 S. Ct. 143, Ann Cas 1917B 927; *Pierce Oil Corp. v. Hope*, 248 U. S. 498, 63 L. ed 381, 39 S. Ct. 172; . . . In no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. *Hadacheck v. Sebastian*, supra (239 U. S. p. 410, 60

L. ed 356, 36 S. Ct. 143, Ann Cas 1917 B 927). And see *Chicago B & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed 948, 18 S. Ct. 513; *Hutchinson v. Valdosta*, 227 U. S. 303, 57 L. ed 520, 33 S. Ct. 290. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. *Block v. Hirsh*, 256 U. S. 135, 155, 65 L. ed 865, 870, 41 S. Ct. 458, 16 A. L. R. 165."

The Florida courts have sustained the application of Section 253.122, Florida Statutes, to Petitioner's lands on two grounds. The first of these, the police power, has been amply discussed. The second of these grounds has come to be known as the inalienable trust doctrine. The doctrine was enunciated by the United States Supreme Court in *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387 (1892). The Florida Supreme Court adopted this doctrine in *State ex rel. Ellis v. Gerbing*, 47 So. 353 at 355 (1908):

"The trust with which these lands are held by the state is governmental, and cannot be wholly alienated. For the purpose of enhancing and improving the rights and interests of the whole people, the state may by appropriate means grant to individuals the title to limited portions of the lands, or give limited privileges therein, but not so as to divert them from their proper uses, or so as to relieve the state of the control and regulation of the uses afforded by the land and waters."

The court in *Ellis v. Gerbing*, supra, also said:

"A state may make limited disposition of portions of such lands, or the use thereof, in the interest of the public welfare, where the rights of the whole people of the State as to navigation and other uses of the waters are not materially impaired. The States cannot abdicate general control over such lands and the waters thereon since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good."

A similar application of Section 253.122, Florida Statutes, was upheld as an exercise of the police power or as an exercise of the retained power under the trust doctrine governing sovereign lands in *Gies v. Fischer*, (Fla.) 146 So. 2d 361 at 363 (1962). Therefore, the application of Section 253.122 to Petitioner's lands may be upheld as an application of the inalienable trust doctrine.

Consideration of the record will establish that Petitioner has never contested the reasonableness of locating a bulkhead line on his property. He has confined his argument to the validity of the statute. Consequently, he should not be permitted to argue that the application is unreasonable.

Petitioner relies heavily on *Wood v. Lovett*, 313 U. S. 362 (1941). In that case the appellant purchased land from the State of Arkansas. The state had acquired the land from the appellee for nonpayment of taxes. An Arkansas statute in effect at the time of appellant's purchase protected the appellant from having his deed set aside on certain grounds which were named in the statute. The statute was repealed and appellee had the deed set aside on one of the named grounds. The U. S. Supreme Court held that the repeal was an unconstitutional impairment of contract.

The Arkansas action must be viewed in the setting of the statutory scheme of taxation, sale of forfeited lands to the state, and sale in turn by the state. Its purpose was to assure one willing to purchase from the state a title immune from attack on grounds theretofore available. By its legislation the State said, in effect, to the prospective purchaser of lands acquired by deliquent taxes, that if he would purchase he would have the immunity. The immunity was necessary in order to induce persons to purchase lands under tax deeds and thus return them to the tax rolls. The right to fill was neither an inducement to purchase nor a part of the obligation of the contract. Incumbent upon the State of Arkansas was the duty, arising from its contracts with purchasers to protect their titles from attack. The State of Florida had no duty to purchasers of submerged lands to permit promiscuous unrestrained filling of such lands. On the contrary, the State's duty to its citizens was to regulate such activity. An analogy at this time is obvious. Were the State to sell lands within a municipality with the knowledge that the purchaser intended to construct a building fronting on

the sidewalk, the city would not thereby be precluded from establishing a reasonable building set-back line prohibiting such construction. Nor is the County of Manatee precluded from setting a bulkhead line simply because the state sold the lands with the knowledge that Petitioner intended to fill them.

Assuming, solely for purposes of argument, that the preservation of the right to bulkhead and fill was a part of the State's obligation under the contract, then the power and duty of the State with respect to sovereignty lands is also a part of the contract.

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398. Also see Mr. Justice Black's dissent in *Wood v. Lovett*, supra; and see *Meyer v. City of Eufaula, Oklahoma*, 154 F. 2d 943 at 945, Circuit Court of Appeals, Tenth Circuit (1946).

Under the state's sovereign power to regulate on behalf of the health, welfare and safety of its citizens as well as its duty to so regulate under the trust with which submerged lands under navigable waters are inalienably impressed, the State of Florida may regulate the extent of the fill on Petitioner's land.

Petitioner also relies heavily on *Appleby v. New York*, 271 U. S. 365. In the Appleby case, the City of New York maintained a condition on its property which fostered the mooring of boats on Appleby's property. Consequently,

a suit was brought to enjoin the City from using and dredging Appleby's lots. Neither the State of Florida nor the County of Manatee are using Petitioner's property. He is merely prohibited from filling his property past the bulkhead line. Respondent, the County of Manatee, has set forth in its Petition for Denial such other substantial distinguishing facts as to show that the Appleby case is totally inapplicable to the case at bar.

CONCLUSION

The application of Section 253.122, Florida Statutes, to Petitioner's lands may be sustained on the grounds that no impairment of contract took place, that it is a legitimate exercise of the police power of the State, that it was not an unconstitutional taking without due process, and as valid application of the inalienable trust doctrine.

Respectfully submitted,

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JAMES T. CARLISLE
Assistant Attorney General

Counsel for Respondents,
Trustees of the Internal
Improvement Fund of the
State of Florida

APPENDIX

1. Opinion of the Supreme Court of Florida, affirming order of Circuit Court dismissing Petitioner's complaint.

IN THE SUPREME COURT OF FLORIDA,

JANUARY TERM, A. D. 1964.

THE CORTEZ COMPANY,

Appellant,
Case Number 32,655

vs.

COUNTY OF MANATEE, et al.,

Appellees.

Opinion filed January 17, 1964.

An Appeal from the Circuit Court for Manatee County, Robert E. Willis, Judge

Robert E. Knowles of Knowles, Knowles and Mann, for Appellant

James W. Kynes, Attorney General, Robert C. Parker and James T. Carlisle, Assistant Attorneys General for Appellees

ROBERTS, J.

This appeal is from an order dismissing an original complaint for declaratory and other relief consequent upon a proceeding by which a bulkhead line was set pursuant to Section 253.122, Florida Statutes, across submerged

lands purchased by appellant from the appellee Trustees of the Internal Improvement Fund under contract of October 6, 1955.

We find that the controverted order must be affirmed upon authority of *Gies v. Fischer*, Fla. 1962, 146 So. 2d 361. That decision disposed of the *constitutional issues* contrary to appellant's contentions, construing the provisions of the statute that such a line "shall represent the line beyond which a further extension . . . shall be deemed an interference with the (public) servitude" as vesting a discretion based on factual determinations, and not arbitrary or capricious in nature.

The power vested in the authorities named in the statutes to fix and determine these lines, must be exercised in the interest of the general welfare and not for the purpose of granting advantage to or imposing penalties upon individual upland owners or others. Nothing in the decision in the Gies case nor this decision is to be construed as depriving the courts, in such cases, of jurisdiction or authority to correct such action where or when it occurs in an appropriate proceeding.

The record in this cause indicates that the propriety of the *procedural* steps followed by the County and the Trustees is not in issue, and appellant's objections to the order below in other respects are without merit.

Affirmed.

DREW, C. J., THORNAL, O'CONNELL and CALDWELL, J. J., concur

2. Order of Supreme Court of Florida denying Petition for Rehearing:

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1964,
Thursday, February 13, 1964.

THE CORTEZ COMPANY,

Appellant,

—vs—

COUNTY OF MANATEE, et al.,

Appellees.

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY

TEST:

GUYTE P. McCORD
CLERK SUPREME COURT

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT OF MANATEE COUNTY)

3. UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10, CLAUSE 1.

"No State shall . . . pass any . . . law impairing the obligation of contracts. . ."

4. UNITED STATES CONSTITUTION, AMENDMENT 14.

"No person shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

5. SECTION 120.041(1), FLORIDA STATUTES, 1964.

"Each agency shall file with the secretary of state a certified copy of each rule adopted by it."

6. SECTION 253.15, FLORIDA STATUTES, 1955.

"In case any island or submerged lands are sold, purchasers shall have the right to bulkhead and fill in same."

7. SECTION 253.12, FLORIDA STATUTES, 1957.

". . . navigable waters . . . shall include all coastal and intercostal waters, of the state. . ."

8. SECTION 253.122, FLORIDA STATUTES, 1957.

Subject to the formal approval of the Trustees of the Internal Improvement Trust Fund, the Board of County Commissioners of each county . . . are hereby authorized on their own initiative to locate and fix a bulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable water of the county as defined in Section 253.12 . . . Any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of land or islands outward into the waters of the county shall be

deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of the state are inalienably impressed."

9. SECTION 200-2.02 OF THE RULES OF THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND.

Said rule is set out on pages 7 and 8 of the text of this Response to Petition for Writ of Certiorari.